(4)

No. 96-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALEZ, HON. JACK HIGHTOWER, HON. NATHAN L. HECHT, HON. LLOYD DOGGETT, HON. JOHN CORNYN, HON. BOB GAMMAGE, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION AND ITS CHAIRMAN W. FRANK NEWTON,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE COLUMBUS BAR ASSOCIATION AND THE LEGAL AID SOCIETY OF COLUMBUS AS AMICI CURIAE IN SUPPORT OF PETITIONER

RICHARD A. FRYE
CHESTER, WILLCOX & SAXBE
17 South High Street
Suite 900
Columbus, Ohio 43215
(614) 221-4000

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for the Amici Curiae

23 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Constitutional and Statutory Provisions

Other Authorities

No. 96-1578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALEZ, HON. JACK HIGHTOWER, HON. NATHAN L. HECHT, HON. LLOYD DOGGETT, HON. JOHN CORNYN, HON. BOB GAMMAGE, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION AND ITS CHAIRMAN W. FRANK NEWTON,
Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE COLUMBUS BAR ASSOCIATION AND THE LEGAL AID SOCIETY OF COLUMBUS AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

The Columbus Bar Association is a non-profit organization that was created to deal with issues involving the governance and responsibilities of the practicing bar. Among these responsibilities, in its view, is the need to address the persistent problem of assuring access to legal services for the economically

disadvantaged. In this regard, the Columbus Bar Association has been directly involved with the "Interest on Lawyers' Trust Account Program" ("IOLTA" program) in central Ohio, which has emerged as an innovative means of creating funding for legal services to the poor out of sources that could not be utilized to generate any income prior to the institution of this program.

The Legal Aid Society of Columbus is a non-profit organization that is committed to providing legal aid services to those who ordinary do not have access to such services in our society, usually because of personal financial constraints. In recent years, as the Federal government's financial support for these services has declined and become more uncertain, the Legal Aid Society, like other similar groups around the country, has been able to draw upon the resources provided by IOLTA programs and other sources to continue their work. If IOLTA programs are disabled by decisions like the ruling of the court below, then the continued activities of non-profit organizations like the Legal Aid Society of Columbus will be jeopardized. The consequent harm to those who lack the resources to have meaningful access to our courts is obvious, and would cause them to suffer even greater difficulty in realizing the constitutional promise that they should have the "equal protection of the laws."

For these reasons, the amici curiae have a direct interest in the constitutional issues raised in this case, the resolution of which will dictate whether IOLTA programs will be able to continue to operate in every jurisdiction where they have been approved and implemented.[1]

[1] Counsel for both petitioners and respondents have consented to the filing of this brief. Letters evidencing such consent are on file in the Clerk's office.

QUESTION PRESENTED

Whether state IOLTA programs, which aggregate client trust funds that would not otherwise earn any interest so that the interest on the combined funds can be utilized by non-profit organizations whose primary purpose is the direct provision of legal services to the poor, constitute an unconstitutional "taking" of property for public use without "just compensation."

REASONS FOR GRANTING THE WRIT

As petitioners have noted, IOLTA programs have been adopted and implemented in essentially the same form in 49 States, and Indiana, currently the lone exception, is now in the process of instituting such a program.[2] It is thus obvious that the issues raised in this case about the validity of these programs are of broad importance to the funding of legal services to the poor throughout this country. Rather than belabor this point, the amici will focus on the specific grounds of the disagreement among the lower courts on the takings issues raised in this case, in order to show the intractable nature of the split in those decisions. The amici also will discuss the doctrinal importance of these constitutional issues, which have not been, but should be, decided by this Court.

I. THE LOWER COURTS DISAGREE ABOUT WHETHER STATE IOLTA PROGRAMS TAKE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE TAKINGS CLAUSE.

Petitioners have noted that the ruling below conflicts with decisions rendered by two other federal courts of appeal and

[2] Although the Indiana Supreme Court had previously denied a petition to establish an IOLTA program, *see Matter of Ind. State Bar*, 550 N.E.2d 311 (Ind. 1990), it recently approved such a program in principle. *See* Pet. 3.

seven state supreme courts. *See* Pet. 12-16. This split among the courts was explicitly recognized by the court below and is ripe for review here because it is grounded on flatly irreconcilable views about the merits of the takings issues raised in the petition.

The first court to address the validity of state IOLTA program under the Takings Clause was the Florida Supreme Court. *See Matter of Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981). In the course of its opinion rejecting the claim that its program constituted an improper taking, the court considered the applicability of the decision that this Court had issued the previous year in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In the *Webb's* case, a client was obliged by law to tender the $1,800,000 purchase price of a business to the clerk of the court in an interpleader action and those funds earned more than $100,000 in interest before the matter was finally resolved. The clerk was entitled by law to charge a separate fee for the services rendered in depositing and maintaining the funds. In these circumstances, this Court held that the Takings Clause was violated when the clerk ultimately closed the fund and returned the $1,800,000, but refused to pay out the accrued interest to the client. *Id.* at 160-65.

The Florida Supreme Court noted that the administration of an IOLTA program differs from the circumstances of the *Webb's* case in material respects. Most important is the fact that all of the amounts deposited under the terms of an IOLTA program are funds that would be unable to earn interest on their own account, either because the amounts are too insignificant or the duration is too transitory to permit the accrual of interest that would make it feasible, in light of banking restrictions and administrative charges, to earn any actual return. *See* 402 So. 2d at 395. Based on this central distinction, the court concluded that the IOLTA program does not effect a "taking" within the meaning of the Fifth and Fourteenth Amendments:

> The most relevant distinction [between an IOLTA program and the *Webb's* case], plainly, is the fact that no client is compelled to part with "property" by reason of a state directive, since the program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances. . . . It follows that no client has a "property interest," in the constitutional sense, which is being taken from him by this program.

Id. at 395-96. On this basis, the Florida Supreme Court approved this method of "enhanc[ing] the capability of the legal profession to deliver legal services to the poor," which "has long been a cherished commitment of this Court." *Id.* at 396.

Over the ensuing years, a number of other state supreme courts confronted the same takings issue in determining whether to adopt essentially the same kind of program within their jurisdictions. These court uniformly found that because -- aside from the provisions made under the IOLTA program itself -- "the earnings of funds held in trust accounts can benefit neither the attorney nor the client, but simply redound to the benefit of the depository institution," there is no taking of property in aggregating those funds for the purpose of generating a new source of income to fund legal services to the poor. *Matter of Interest on Lawyers' Trust*, 675 S.W.2d 355, 357 (Ark. 1984); *see also Petition of Minn. State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982) ("There simply is no "property" now in existence that would be taken."). Many of these courts treated this issue by expressly applying the same rationale adopted by the Florida Supreme Court. *See, e.g., Petition by Mass. Bar Ass'n*, 478 N.E.2d 715, 718 (Mass. 1985) ("We agree with the Florida court's analysis and conclude that there is no constitutional impediment to the IOLTA proposal"); *Petition of N.H. Bar Ass'n*, 453 A.2d 1258, 1261 (1982) (same).

In the meantime, the objectors to the Florida IOLTA program brought their constitutional objections to the federal courts. In *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987), the Eleventh Circuit affirmed the trial court's ruling that upheld the validity of the program and rejected the claim that it effected an unconstitutional taking. It began by recognizing that the claim turned on the question "whether the interest earned on nominal or short term funds held in an IOLTA account was the property of the client for the purposes of the Fifth and Fourteenth Amendments." *Id.* at 1004. Although plaintiffs had argued that "interest follows principal," in accordance with traditional property law, the court stated that "when Justice Johnson observed in *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319 (1809), that 'interest goes with the principal, as the fruit with the tree,' his illustration necessarily assumed the existence of a fruit-bearing tree." 819 F.2d at 1004 (other quotes omitted). Because the IOLTA funds would not have been able to generate any income net of expenses apart from the organization and operation of the IOLTA program itself, the court held that the plaintiff had no "specific and legitimate 'claim of entitlement'" to funds created by the IOLTA program. *Id.* at 1004-05 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and *Perry v. Sinderman*, 408 U.S. 593, 601-02 (1972)). No "positive rules of substantive law or mutually explicit understandings" were identified to support the plaintiff's *post hoc*, unilateral claim that it should receive interest generated by the IOLTA program. *Id.*

The Eleventh Circuit took basically the same approach as the numerous state supreme courts in distinguishing this Court's decision in the *Webb's* case. The funds in *Webb's*, which "were sufficient in amount, and held for a sufficient period of time, to generate $90,000 in interest over a year and a half" did "give rise to a legitimate claim of entitlement" to those proceeds. 819 F.2d at 1007. By contrast, the deposits made under the terms of the IOLTA program had no net value, for they could not

generate any "legitimate expectation of interest exclusive of administrative costs and expenses." *Id.* (internal quotes omitted). The court stressed that the point was *not* that the amount of income generated was slight and therefore subject to some sort of "de minimis" exception to the Takings Clause. Instead, the point was that because each individual deposit in the IOLTA program, standing alone, "could not earn *anything*," the program effected "*no taking* of any property" belonging to any individual depositor. *Id.* (emphasis added).

In 1990, the Indiana Supreme Court confronted the same constitutional issue and disagreed with the consistent direction taken by these other courts. *Matter of Ind. State Bar*, 550 N.E.2d 311 (Ind. 1990). Relying on the same quotation from Justice Johnson's 1809 opinion in *Himely* that was discussed and distinguished by the Eleventh Circuit in *Cone*, the court held that denying interest on the sum invested "amounted to a double wrong by depriving the person owed of the increase to which he was justly entitled and by allowing the one holding the funds to profit from the use of the funds that did not rightly belong to him." *Id.* at 312 (quotation omitted). The court went on to find the *Webb's* decision controlling and declined to approve the proposed IOLTA program. In so holding, the court resolved the constitutional issue without addressing the contrary analysis of these points made in the previous decisions -- namely, that no client was "justly entitled" to funds generated by IOLTA programs on accounts that were not capable of earning any net income on their own, and that the only "profit" previously derived from those accounts had redounded to the sole benefit of the depository institutions. *Id.*

In 1993, similar constitutional claims reached the First Circuit in a challenge to the Massachusetts IOLTA program that was principally initiated by the same plaintiff that brought this case. *See Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993). There the plaintiffs

contended that "the IOLTA program's appropriation of interest from lawyers' trust accounts takes the beneficial use of client funds which constitutes an unconstitutional taking in violation of the Fifth and Fourteenth Amendments." *Id.* at 973. As in all of these cases, the court began by considering whether the plaintiffs had shown "that they possess a recognized property interest which may be protected by the Fifth Amendment." *Id.* The court recognized that the Constitution protects both tangible and intangible property rights, but quoted the *Webb's* decision as holding that "'a mere unilateral expectation or an abstract need is not a property interest entitled to protection.'" *Id.* at 973-74 (quoting *Webb's*, 449 U.S. at 161).

In determining whether claims raised by individual clients to the proceeds generated by IOLTA funds amounted to protected "property" under these classifications, the court first ruled that the IOLTA program did not work "a physical invasion of real property" that would constitute a *per se* taking under this Court's precedents. *Id.* at 975. The First Circuit also agreed with the Eleventh Circuit's analysis in distinguishing the *Webb's* case because "the plaintiffs do not have a property right to the interest earned on their funds held in IOLTA accounts." *Id.* at 975-76 (citing *Cone*, 819 F.2d at 1006-07). Based on this reasoning, the court dispatched the plaintiffs' taking claims by holding that "the IOLTA program does not occupy or invade the plaintiffs' property even temporarily" because "the interest earned on IOLTA accounts is not the plaintiffs' property." *Id.* at 976. The court went on to conclude that any regulation of private property that could be said to be accomplished through IOLTA programs was not significant because the plaintiffs did not have any legitimate "investment-backed" expectations to the use of the funds deposited under the IOLTA program. *Id.* (citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986)).

The First Circuit thus adopted the main features of the Eleventh Circuit's analysis of the takings issue. The core of that analysis, again, is that because individual client funds would not be able to earn interest on their own account net of expenses and administrative charges, the income generated by the operation of IOLTA programs is not "property" within the meaning of the Takings Clause. In addition, the First Circuit went further to analyze the takings issue from the standpoint of mere economic regulations, and found by the same rationale that individual clients had no legitimate "expectation-backed" expectations to control the use of any such proceeds that would not have accrued from their individual fund accounts. *See* 993 F.2d at 973-76.

The ruling below, however, is directly at odds with the analysis adopted by the First and Eleventh Circuits, as well as the overwhelming majority of state supreme courts. In the trial court, the parties did not dispute the facts that are material to the takings issue. In particular, the District Court found that the only funds eligible for the Texas IOLTA program, as with all of the IOLTA programs, are those which "could not reasonably be expected to earn interest for the client" over and above "the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred." *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 873 F. Supp. 1, 4 (W.D. Tex. 1995) (quoting Texas State Bar IOLTA Rule 6).[3] Based on these facts, the plaintiffs raised the same takings claims that had been raised in turn in the *Cone* and *Massachusetts Bar* cases, alleging that the

[3] The District Court took special pains to note that there was no genuine issue of material fact concerning whether "sub-accounting is a practical means of generating net interest for clients who deposit small amounts of money with their attorney" because it was conceded that "any type of account that can earn interest beyond the costs of maintaining such account is beyond the scope of IOLTA's coverage." 873 F. Supp. at 4 n.2.

IOLTA program effected a taking both of the interest generated by the IOLTA funds and of the "beneficial use" of their property through the operation of the program. *Id.* at 5.

The District Court squarely relied on the Eleventh Circuit and First Circuit decisions to reject plaintiffs' takings claims, finding "[t]he logic supporting both of these opinions" to be "compelling." *Id.* at 7; *see also id.* at 6-7 (discussing *Cone* and *Massachusetts Bar*). Applying their analysis, the District Court held that the IOLTA program did not "interfere with interests that are sufficiently bound up with the reasonable expectations of the person asserting the deprivation" to be recognized as a constitutional taking. It therefore distinguished the *Webb's* decision in precisely the same manner as those courts had:

> In sum, the property rights of the Plaintiffs in this action and the claimants in *Webb's* are clearly different, and, as there is no property interest or expectation appropriated, there is no taking for Fifth Amendment purposes. Accordingly, the Court finds that the Plaintiffs have failed to allege a cognizable Fifth Amendment takings claim with regard to the interest generated by funds placed in IOLTA accounts.

Id. at 7.

On appeal, the Fifth Circuit reversed, explicitly rejecting the core analysis that had been adopted by the Eleventh and First Circuits and by many state supreme courts. *See Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996, 1000-04 (5th Cir. 1996). Instead, the court resurrected the "interest follows principal" approach that had been followed by the Indiana Supreme Court, but was directly repudiated by the Eleventh Circuit in *Cone*. "In light of this rule, it seems obvious that the interest earned in the IOLTA accounts is the property of the clients whose money is held in those accounts." *Id.* at

1000. The Fifth Circuit acknowledged that the District Court's contrary ruling "adopted the theory espoused by the First and Eleventh Circuits, which circumvents this rule," but contended that this reasoning "does not give proper weight to Supreme Court precedent." *Id.*

The Supreme Court precedent that the Fifth Circuit found most compelling, of course, was the *Webb's* decision, which the court characterized as presenting "a similar situation" to the state IOLTA programs. *Id.* Reading that decision broadly, the court concluded that it represented a general holding that under any circumstances, the interest generated on any principal must be allocated to the ultimate owners of the principal. *Id.* at 1000-02. The court then considered and rejected the understanding of *Webb's* that forms the central premise of the "numerous" state court rulings to the contrary, as well as the Eleventh Circuit's decision in *Cone*. Treating the distinction between the *Webb's* case and IOLTA programs as merely a difference of degree, rather than as a difference of kind, the court opined that "inherent in [the Eleventh Circuit's] *Cone* analysis is the notion that the value of the alleged property involved determines whether there is a cognizable property interest."[4]

The Fifth Circuit went on to criticize the Eleventh Circuit's decision in *Cone* for "fail[ing] to consider the precise events of the transaction," contending that "a bank pays interest on the account and then deducts fees." *Id.* at 1003. Ignoring the crucial fact that these "fees" and administrative charges had been found by the trial court to exceed any interest payments that would be generated by any individual client's IOLTA funds, the court concluded that "a property interest attaches the moment that the interest accrues" and remains vested in the

[4] The court thus acknowledged but disbelieved the Eleventh Circuit's express admonition that the *Cone* decision should not be taken to establish "a de minimis standard for Fifth Amendment takings." *Id.* at 1002 & n.36 (quoting *Cone*, 819 F.2d at 1007).

owner of the principal. *Id.* In a footnote, the court also dismissed the First Circuit's contrary decision as resting on "dicta," despite the fact that the plaintiffs had raised the same takings claims in this case and the First Circuit's analysis of those claims had inevitably obliged it to determine whether a client has a cognizable "property" right in IOLTA funds, declaring that this essential issue "was not properly before" the First Circuit in deciding that case. *Compare id.* at 1002 n.35 *with Massachusetts Bar*, 993 F.2d at 973-76.

The ruling below thus stands with the 1990 decision by the Indiana Supreme Court in direct conflict with the decisions of several other state supreme courts. It expressly renounces the takings analysis employed by the Eleventh Circuit in an identical case, and weakly distinguishes the First Circuit's decision that had adopted the Eleventh Circuit's analysis when it addressed the same takings issues that are raised in this case. All of these other decisions by lower courts of last resort distinguish the *Webb's* case, which the court below found to be controlling, on the ground that the client funds deposited in that case "were sufficient in amount, and held for a sufficient period of time," to "give rise to a legitimate claim of entitlement" to the proceeds. *Cone*, 819 F.2d at 1007; *see also Matter of Interest on Trust Accounts*, 402 So. 2d at 395-96 (same). By contrast, the deposits made under the terms of the IOLTA program have no net value; according to the District Court's express finding of fact in this case, they "could not reasonably be expected to earn interest for the client" over and above "the cost of establishing and maintaining the account." 873 F. Supp. at 4.

This direct conflict among the lower courts of last resort warrants plenary review by this Court. Indeed, on further proceedings in this case, six judges of the full Fifth Circuit Court of Appeals dissented from the order denying rehearing *en banc*, and Judge Benavides' separate dissenting opinion was joined by Chief Judge Politz, Judge Stewart, and Judge Parker.

Washington Legal Found. v. Texas Equal Access to Justice Found., 106 F.3d 640 (5th Cir. 1996). In that dissent, these judges emphasized the resulting split among the lower courts, stating that the panel decision "is an important one because it contradicts every other court in the country that has addressed this issue, including two of our sister circuits and a large number of state appellate courts." *Id.* at 641 (Benavides, J., dissenting).

The dissenting judges also sharply criticized the panel's reliance on the *Webb's* decision. "A careful reading of *Webb's* makes clear that the existence of interest proceeds *to which the depositors were entitled* was a prerequisite to the Court's decision." *Id.* at 643 (emphasis added). They pointed to language in the opinion recognizing that any proceeds from the interpleader fund would first have to be reduced by all "proper charges" before they could be distributed to lawful claimants, which strongly suggests that "the state law rule that 'interest follows principal' controls only when interest is earned on the principal or, in other words, when interest proceeds are available." *Id.* (discussing *Webb's*, 449 U.S. at 161-65). They further criticized the panel's view that the alleged "two-part process" for assigning interest to a depositor was accurate either as a matter of normal banking practices or as a matter of law under the Takings Clause. *See* 106 F.3d at 643-44.

Moreover, the dissenting judges buttressed their argument by pointing to "the available remedy for plaintiffs whose property has been unconstitutionally taken." *Id.* at 644. "Such plaintiffs are entitled to just compensation, *i.e.*, the fair market value of their property. Because the fair market value of the earnings of IOLTA-eligible funds is $0, the client would be entitled to nothing." *Id.* This point is significant because "applying Fifth Amendment protections to an asserted property interest that does not have any compensable value is not consistent with the purposes that underlie the Takings Clause." *Id.*

The foregoing discussion of the principal authorities thus shows that the split in the lower courts on the takings issues raised by state IOLTA programs is deep and irreconcilable. The disagreement permeates the very foundations of the conflicting legal analyses, including differing views about how to read this Court's *Webb's* decision, about whether individual clients have a "property" right to the proceeds of IOLTA funds, and about whether such clients have any legitimate "investment-backed" expectation to those proceeds. At the same time, these conflicting decisions will inflict uncertainty and confusion upon the administrators of state IOLTA programs throughout the country, and the legal service providers who are their direct beneficiaries, if the Court does not grant plenary review to resolve the takings issues in this case.

II. WHETHER THE STATE IOLTA PROGRAMS CONSTITUTE A "TAKING" OF PROPERTY WITHOUT "JUST COMPENSATION" RAISES IMPORTANT CONSTITUTIONAL ISSUES THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

In his dissent from denial of rehearing *en banc*, Judge Benavides observed that the takings issue posed in this case "raises very difficult and interesting conceptual issues regarding the proper definition of property for fifth amendment purposes." 104 F.3d at 645-46 (Benavides, J., dissenting). This observation is undeniably correct, and provides yet another reason why the petition for certiorari should be granted here.

In the *Webb's* case, the Court noted probable jurisdiction to decide "whether it is constitutional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by another statute, is also charged for the clerk's services in receiving the fund into the registry."

449 U.S. at 155-56. The Court granted plenary review to determine that issue because the Florida Supreme Court's decision was judged to be in conflict with decisions rendered by the Texas and North Carolina Supreme Courts. *Id.* at 159. Although the Court gave no indication that the particular mechanisms of the interpleader fund at issue in that case derived from a uniform program that had been adopted nationwide, nonetheless the Court believed that the takings issue was sufficiently important to warrant a full review on the merits.

By comparison to *Webb's*, the takings issues presented in this case clearly warrant the Court's consideration on the merits. The disagreement among lower courts of last resort is especially pronounced here, with the Fifth Circuit consciously disregarding decisions on the same constitutional issues that had been rendered by several state supreme courts and two federal courts of appeals. The Fifth Circuit's decision directly undercuts the Texas courts' approval of their own IOLTA program as legally valid, and appears to invalidate the same programs that are operating in Louisiana and Mississippi. State IOLTA programs have been implemented nationwide, and are of increasing importance to assuring the continued availability of legal services to those who cannot afford to hire a lawyer on their own. As Judge Benavides and the other dissenting judges noted, the panel's ruling below threatens "a primary source of funding for public interest legal organizations" at a time "when those organizations are already struggling for their lives financially." 106 F.3d at 641-42.

In addition, however, the conceptual issues involved here are of broader significance to the development of the Court's takings jurisprudence. The threshold issue in all such cases is whether the complaining party has a valid "property right" that has been "taken," which triggers the constitutional command that just compensation be made. Yet the *Webb's* decision did not provide any broad guidance to the lower courts on this issue

in the important context of the administration of legal and judicial funds. On the contrary, the Court closed that opinion by emphasizing "the narrow circumstances of this case," and cautioning that its opinion should not be read to apply outside a situation where state law required the deposit of funds for protection against claims of creditors, "the deposited fund itself concededly is private," and a state statute authorized the clerk to charge a fee "for services rendered" that was distinct from any return accrued on the principal deposit. *Id.* at 164-65.[5]

This case presents the Court with the opportunity to define more clearly the issue of when courts should recognize a "taking" of property rights in the context of legal and judicial funds. Contrary to the view expressed by the panel below, the issue presented here is unlike the situation of a physical taking of tangible property. Under the terms of the IOLTA programs, the nominal or transitory nature of the deposited funds does not give rise to any "reasonable investment-backed expectation" that any net proceeds will be generated from their use. *Id.* at 161. The Court has stressed that such a "property right" must be grounded in "a legitimate claim of entitlement," which involves a strong element of reliance upon the asserted claim. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *Ruckelshaus v. Monsanto* Co., 467 U.S. 986 (1984), for example, the Court held that even where a company has valid property rights in protecting its trade secrets, no "taking" occurs unless the required disclosure of such information interferes with any "reasonable investment-backed expectations." *Id.* at 1004-14.

Similarly, viewing this issue in terms of the formula that the Court has repeatedly employed to gauge whether a

---

[5] These extensive *caveats* further call into question the ruling below, which construed *Webb's* very broadly to stand for an across-the-board legal principle that interest must follow principal without regard to any of the particular circumstances of the funds deposited or the methods of administering those funds. *See* 94 F.3d at 1000-01.

governmental regulation of property constitutes a "taking," the lower courts would very likely benefit from further clarification about how this three-part test, first articulated in *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978), applies to the administration of legal and judicial funds. The First Circuit applied this test, as further developed in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), to IOLTA programs in the *Massachusetts Bar* case and held that there was no physical invasion of property rights under such programs, that their "economic impact" on individual clients is negligible, and that they do not interfere "with distinct investment-backed expectations." *Id.*, 993 F.2d at 974-76 (citing *Connolly* and *Penn Central*).

In addition, this case also presents the Court with an opportunity to clarify that whether such a property right exists at all must be bounded in part by whether the complaining party would be entitled to receive compensation for an infringement upon that right. Judge Benavides framed this principle in his dissent below when he noted that "the fair market value of the earnings of IOLTA-eligible funds is $0," and suggested that "applying Fifth Amendment protections to an asserted property interest that does not have any compensable value is not consistent with the purposes that underlie the Takings Clause -- to compensate a property owner for the value of her property that was taken for public use." 106 F.3d at 644.

Judge Benavides' suggestion is consistent with the Court's prior decisions that have explored the meaning of the "just compensation" requirement. Justice Holmes long ago summarized the proper test under this component of the Takings Clause as an determination of "what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). Moreover, in a series of decisions, the Court has held that when the government effects a taking of property, basic fairness dictates that the government

is not required to compensate the property owner for elements of the property's value that the government itself had created. *See, e.g., United States v. Fuller*, 409 U.S. 488 (1973) (value created by government's grant of a revocable permit to graze his animals on adjoining Federal lands); *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943) (value created was business opportunity dependent on owner's privilege to use the state's power of eminent domain). If those same bounds are applied to the operation of state IOLTA programs, then any alleged "taking" of property would not be compensable because the individual client's funds are, by strict definition, incapable of generating any income net of administrative expenses, and any value derived from the funds is created solely by the operation of the IOLTA program itself.

The takings issues presented in this case thus involve important questions of federal constitutional law that have not been, but should be, settled by this Court.

CONCLUSION

For these reasons, as well as those stated by petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. FRYE
CHESTER, WILLCOX & SAXBE
17 South High Street
Suite 900
Columbus, Ohio 43215
(614) 221-4000

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for the Amici Curiae

May 1997